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NO. 86-561

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

GEORGE F. GRODE, INSURANCE COMMISSIONER OF THE COMMONWEALTH OF PENNSYLVANIA,

Petitioner

v.

UNITED SERVICES AUTOMOBILE ASSOCIATION, a Texas Reciprocal Interinsurance Exchange, USAA CASUALTY INSURANCE COMPANY, a Texas Stock Insurance Company, USAA LIFE INSURANCE COMPANY, a Texas Stock Insurance Company, USAA ANNUITY AND LIFE INSURANCE COMPANY a Texas Stock Insurance Company,

Respondents

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

	Page
ARGUMENT.....	2
CONCLUSION.....	15

TABLE OF CITATIONS

CASES	PAGE(S)
Aluminum Co. of America v. Utilities Commission of State of North Carolina, 713 F.2d 1024 (4th Cir. 1983), cert. denied, 465 U.S. 1052 (1984)	13
Gibson v. Berryhill, 411 U.S. 564 (1973)	4,11,12
Hawaii Housing Authority v. Midkiff, 467 U.S. 299 (1984)	9
Ohio Civil Rights Commission v. Dayton Christian Schools, Inc. No. 85-488 (June 27, 1986)	passim
Railroad Commission of Texas v. Pullman, 312 U.S. 496 (1941)	3,9
SEC v. National Securities, Inc., 393 U.S. 453 (1969)	11
Younger v. Harris, 401 U.S. 37 (1971)	passim
STATUTES:	
McCarron-Ferguson Act, 15 U.S.C. §§1101-1105	10,11

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ARGUMENT

1. Respondents misconceive the bases for both the decision of the Court of Appeals and this Court's decisions in arguing (Br. in Opp. 9-13) that abstention is impermissible under Younger v. Harris, 401 U.S. 37 (1971), because of their allegations that a license revocation order, even if stayed pending review, will cause them irreparable harm.

a. The sole basis for the Third Circuit's rejection of Younger abstention was its conclusion that the administrative proceeding was not part of the judicial process "[b]ecause the insurance department in its administrative proceedings cannot consider USSA's constitutional arguments . . . ." Pet. App. 77a. This much is clear from

Judge Becker's concurrence in which he disagrees with the majority's conclusion that respondents' claim of harm supports rejection of Pullman abstention, but nevertheless concurs in the majority's rationale for rejecting Younger abstention. Properly understood, the decision below rests on the simple conclusion that Younger abstention is inappropriate where constitutional claims cannot be decided by an administrative tribunal. This conclusion conflicts squarely with the decision in Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., No. 85-488 (June 27, 1986), justifying summary reversal.

In addition to tampering with the plain rationale of the decision below, respondents virtually concede that some action by this Court is appropriate. Respondents make no attempt to dispute our main point that the decision

in Dayton Christian Schools removes the essential prop for the decision below. Instead, they characterize that decision as resting on the absence of any suggestion by the school that it would suffer irreparable harm from the administrative proceedings. Br. in Opp. 9. This ignores the argument made by the school, and rejected by the Court, that "the mere exercise of jurisdiction over it by the state administrative body violates its First Amendment rights," slip op. at 8, thereby subjecting it to irreparable harm. Gibson v. Berryhill, 411 U.S. 564 (1973), likewise does not support respondents' broad argument. The conclusion in Gibson that abstention was inappropriate rested on the principle that a biased administrative tribunal could not provide an adequate

forum for resolution of constitutional claims. Id. at 577. The Court's mention of findings that revocation of appellees' medical licenses and "attendant publicity" would cause irreparable harm was not essential to the Court's decision. Id. at 577 n.16.

Respondents stress (Br. in Opp. 15) that in some of their briefs and in affidavits submitted in support of other matters in the District Court they averred that an administrative decision tentatively revoking their insurance licenses in Pennsylvania would cause them harm. The District Court refused to credit these allegations, apparently agreeing with our submission (Pet. 43) that these claims were too speculative to support a finding of irreparable harm. In any event, assertions of this

nature almost never can be refutted since they amount to no more than a guess as to the possible reactions of unidentified individuals in response to an action with which respondents apparently have no experience. If this level of hyperbole is sufficient to defeat abstention, there is little left of the doctrine.

If respondents are correct that those faced with license revocation proceedings need only allege that they will suffer irreparable harm because of the publicity surrounding a tentative decision adverse to them, then little survives of the principle, recently reaffirmed in Dayton Christian Schools, that Younger abstention applies to administrative enforcement proceedings. Particularly where the proceedings deal with businesses, there is always the

possibility that an administrative decision will become public and may affect business dealings. Yet there is no hint in Dayton Christian Schools, Younger or any case in between that simple allegations of harm to reputation will suffice to preclude abstention.

Here, of course, as we outlined in our petition (Pet. 44-45), respondents are protected by the petitioner's agreement to withhold revocation of their license pending appeal should the administrative decision be adverse to them. If despite this agreement, the decision below can be characterized as precluding Younger abstention on the simple allegations of harm offered by respondents, then it departs substantially from the rationale underlying

Dayton Christian Schools and the caselaw since Younger. The Court should grant the petition for certiorari to review this remarkable conclusion.*

2. Respondents have failed to respond adequately to our arguments that neither self-serving allegations of potential harm to reputation from on-going state proceedings nor the presence

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*Respondents' suggestion (Br. in App. 13) that abstention is inappropriate because of proceedings in federal court after remand is ludicrous. As respondents themselves concede, little more has occurred in the District Court following remand. Supplemental briefs have been filed on an issue briefed prior to the appeal and the District Court preliminarily enjoined the administrative proceeding. The filing of supplemental briefs adds little, if anything, to the circumstances found insufficient by the Court of Appeals to bar abstention on the notion that the federal court litigation had gone too far to permit abstention. Pet. App. 32a-33a. Of course, a preliminary injunction usually is considered at the outset of a case and its issuance cannot in itself bar abstention.

of a preemption claim preclude abstention under the rationale of Railroad Commission of Texas v. Pullman, 312 U.S. 496 (1941).

a. Respondents do not dispute our submission, endorsed by the Court of Appeals (Pet. App. 58a-59a), that their claim requires resolution of an unsettled question of state law which may moot the constitutional claims. Nor do they take issue with, or even mention, the fundamental premise of Pullman abstention-- the important interests in forestalling the friction necessarily produced when federal courts give tentative answers to unsettled questions of state law and in avoiding unnecessary adjudication of constitutional claims. Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 236 (1984). Both respondents

and the Court of Appeals failed to recognize that these interests must be weighed in the balance.

The District Court concluded (Pet. App. 17a-18a), quite properly, that the general interests mentioned above are reinforced in this case by the Congressional judgment in the McCarron-Ferguson Act, 15 U.S.C. §§1101-1105, that insurance regulation is a matter best left to the States. The Court of Appeals plainly focused too narrowly in rejecting the District Court's conclusion because the regulation here does not deal with the spreading of risk or the relationship between insurer and policyholder and, because banks are not part of the insurance industry. Pet. App. 71a-72a. To the contrary, the statute regulates the licensing of insurance companies, which traditionally involves strong state interests deserving

protection under McCarron-Ferguson. See SEC v. National Securities, Inc., 393 U.S. 453, 460 (1969).

It is understandable that respondents belittle these concerns, since it is presumably inconvenient for them to deal with the laws of many jurisdictions. But Congress believes that the States' interests in this area outweigh insurance company convenience.

As we pointed out earlier (supra, P. 4-5), respondents incorrectly rely on Gibson v. Berryhill, 411 U.S. 564 (1973), for the proposition that claims of irreparable harm to reputation, which are alleged to follow a tentative decision to revoke a license, preclude abstention. Gibson rested on the inadequacy of a biased State tribunal and is distinguishable, in addition,

because petitioner has promised that he will not implement any revocation of respondents' licenses until their claims have been fully adjudicated. If respondents are correct in their characterization of Gibson, it suggests that the recent decision in Dayton Christian Schools either modified Gibson or itself is of little import. This is so because an initial decision to revoke a license inevitably permits the subject to make allegations such as those advanced here. In either case, the Court should grant review to clarify the relationship between Dayton Christian Schools and Gibson.

b. Respondents seem to agree that there is at least some confusion on the question whether preemption claims are constitutional or statutory. Their statement that "Supremacy Clause claims

are often considered 'statutory' or 'nonconstitutional' . . . " (Brief in Opp. 19; emphasis added), at least implies that preemption claims can be considered constitutional claims. Respondents certainly make no effort to dispute our initial submission (Pet. 39-42) that resolution of preemption claims requires consideration of constitutional concerns.

We have pointed out in our petition the conflict among the circuits on the question whether abstention may be ordered for preemption claims and we rest on that discussion. It is worth noting, however, that respondents concede that Aluminim Co. of America v. Utilities Commission of State of North Carolina, 713 F.2d 1024 (4th Cir. 1983),

cert. denied, 465 U.S. 1052 (1984), stands for the proposition that abstention may be appropriate despite the presence in the case of a preemption claim. It is flatly incorrect for respondents to argue (Brief in Opp. 19 n.15) that the Third Circuit in this case adopted anything less than a per se rule precluding abstention in every preemption case. The Court stated, "[W]e hold that preemption claims under the Supremacy Clause are not substantial federal constitutional issues for which abstention might be appropriate." Pet. App. 67a-68a. Plainly, there is a conflict among the circuits on this important issue justifying this Court's review.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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